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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-176

GEORGE STEVENS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

GEORGE STEVENS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 27, 1972.

Opinion Below

The opinion of the United States Court of Appeals is not yet reported; it is set forth in the Appendix, *infra*, at pp. 1a-8a. The United States District Court for the Eastern District of Wisconsin, in convicting petitioner for violation of 18 U.S.C. Section 2312, rendered no opinion.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 27, 1972. A timely-filed petition for rehearing was denied on May 31, 1972. By order dated June 22, 1972, Mr. Justice Rehnquist extended the time for filing this petition to and including July 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether under *Pate* v. *Robinson,* 383 U.S. 375 (1966) and the requirements of Due Process, a District Judge is obligated *sua sponte* to order a competency hearing, where the judge states that he has "serious doubts" about the defendant's competency to stand trial, the defendant's attorney agrees and the defendant has a history of narcotics addiction?

2. Whether the "travesty of justice" test is the proper constitutional standard for determining whether an indigent federal defendant has received the effective "assistance of counsel" guaranteed by the Sixth Amendment.

3. Whether a federal defendant has received effective assistance of counsel when his court-appointed trial attorney (a) presented incongruous defense theories confusing the concepts of incompetency to stand trial, insanity and lack of specific intent (b) failed to request a competency hearing when he deemed the defendant incompetent, and (c) admitted the defendant's guilt to the jury.

Constitutional and Statutory Provisions Involved

Fifth Amendment; Sixth Amendment.

18 U.S.C. Section 4244 (set forth in the Appendix, *infra* at pp. 14a-15a).

Statement of the Case

On January 12, 1971 the petitioner, George Stevens, was indicted in the Eastern District of Wisconsin, under the Dyer Act (18 U.S.C. Section 2312), for transporting a stolen vehicle from Chicago, Illinois to Milwaukee, Wisconsin, with knowledge that it was stolen. On February 18, 1971 petitioner's court-appointed attorney requested a psychiatric examination of petitioner's competency to stand trial, pursuant to 18 U.S.C. § 4244. The motion was supported by the attorney's fairly perfunctory affidavit setting forth five grounds for his belief that the petitioner was insane at the time of the offense or incompetent to stand trial. The trial court granted the motion and appointed a psychiatrist whose subsequent report stated his belief that the petitioner was competent (App., *infra*, p. 3a). After receiving this report the court did not order a hearing as to competency, nor did petitioner's attorney, at that or any other time, request one.

A trial before District Judge Reynolds and a jury commenced on April 5, 1971. Before the trial actually started a hearing was held in chambers during which the petitioner's attorney expressed considerable confusion as to his theory of the case and the proper procedure for raising the defense of diminished intent (Tr. 3-4).*

* "Tr. ____" refers to the transcript of the trial.

The government's case consisted primarily of testimony by two Milwaukee police officers who had arrested and interrogated the petitioner on July 14, 1970 when he was in possession of the stolen automobile (Tr. 21-34).[1]

After the government rested, the petitioner took the stand in his own behalf. He testified that he had been using heroin, cocaine, morphine and barbituates for over twenty years (Tr. 40), that he had used contraband narcotics as recently as a week prior to the trial and was presently under the influence of prescribed barbituates (Tr. 39-44, 47-49). He further claimed that the use of drugs had an amnesiac effect on him, that he was using drugs during July 1970, and that, as a consequence, he could not remember the automobile in question nor his arrest by the Milwaukee police (Tr. 44-6, 59-60, 69-71).

During the cross-examination of the petitioner, the trial judge excused the jury and indicated: "Obviously I have serious doubts about whether or not the man is competent to stand trial" (Tr. 62) (App., *infra*, p. 10a).[2] The Court also questioned the validity of the pretrial psychiatric report, and petitioner's attorney agreed (Tr. 62) (App., *infra*, p. 10a). The trial judge then inquired as to whether the petitioner had ever been in a government hospital, whether such records were available, and what information the FBI background report might contain (App., *infra*, pp. 11a-12a). Once again the Court stated it had "serious doubts that he's mentally competent to stand trial" and expressed the desire for further information (which was

[1] The arrest was on a charge of carrying a concealed weapon; the charges were dropped and petitioner was released by Milwaukee police that afternoon (Tr. 24, 28).

[2] This colloquy is excerpted in the Appendix, *infra* at pp. 10a-13a.

never supplied) (App., *infra,* p. 12a). At this point petitioner's attorney explicitly stated his belief that petitioner was incompetent (App., *infra,* p. 13a). Despite all this, the Court concluded: "I think we will continue and see how it all works out" (Tr. 67). The competency issue was not raised again.

The other defense witness was a licensed pharmacist who testified petitioner was an addict (Tr. 93), that an addict on heroin may have loss of memory (Tr. 97) but that while such individual on drugs is committing various acts he is aware of what he is doing (Tr. 103).

During his closing argument to the jury, petitioner's attorney strongly suggested that petitioner was guilty (Tr. 118), a concession which the government attorney pointed out in his rebuttal (Tr. 126).

Following the jury's verdict of guilty on the one count, the petitioner was given the maximum sentence of five years' imprisonment.

On appeal to the Seventh Circuit, petitioner was represented by different court-appointed counsel. Pointing to six sets of errors and omissions which permeated the conduct of the trial defense, the petitioner argued that he had been denied the effective assistance of counsel. He urged the Seventh Circuit to abandon the stringent "travesty of justice" standard for gauging whether adequate representation has been afforded and to adopt instead a rule which requires legal representation at "the level of normal competency." The Court of Appeals, disinclined to "tarry long" over the argument, perfunctorily declined the invitation and held that the petitioner's trial was not a travesty of justice (App., *infra,* p. 4a). The petitioner also claimed

that the District Court, having expressed "serious doubts" about the petitioner's competency to stand trial, was constitutionally obligated to conduct a hearing on its own initiative. The Court of Appeals disagreed, holding that amnesia was insufficient to serve as the basis for a claimed incompetency to stand trial.

It is to review this judgment that petitioner seeks certiorari.

REASONS FOR GRANTING THE WRIT

This case presents two issues of great importance to the administration of federal criminal justice. The first issue, which involves the obligation of District Courts *sua sponte* to direct competency hearings, implicates the proper administration of 18 U.S.C. Section 4244 in light of the constitutional requirements enunciated in *Pate* v. *Robinson*, 383 U.S. 375 (1966). The other issue, of equal importance, is whether federal courts can continue to be content to uphold the convictions of indigent federal defendants, who claim they have been denied effective assistance of counsel, so long as the trial was not a "travesty of justice." In this case the issues are intertwined since the claim of inadequate counsel is partially premised on counsel's failure to handle properly questions relating to petitioner's competency to stand trial. But each issue independently merits review by this Court.

1.

The decision below conflicts with this Court's ruling in *Pate* v. *Robinson*, 383 U.S. 375 (1966), raising important questions concerning a District Court's obligations under 18 U.S.C. Section 4244.

It is important to stress at the outset that the issue here is not whether the trial court should have declared petitioner incompetent to stand trial, but rather whether that court, on its own initiative and based upon events occurring prior to and at trial, should have ordered a hearing into the question. See *Connor* v. *Wingo*, 429 F.2d 630, 641 (6th Cir. 1970) (dissenting opinion).[3] Section 4244 provides the mechanism for directing such a hearing and the procedures for conducting such an inquiry. But it does not indicate the nature of the District Court's obligation to initiate such a hearing. *Pate* v. *Robinson* does.

In *Pate*, this Court held that "a defendant's present incompetency may become sufficiently manifest during a trial that it denies him due process for the trial court to fail to conduct a hearing on the question on its own initiative." 383 U.S. at 388; see *Green* v. *United States*, 389 F.2d 949, 954 (D.C. Cir. 1967) *(en banc)*.[4] Since the evidence confronting the trial court raised a "bona fide" doubt as to

[3] The test for judging the ultimate issue—competency to stand trial—is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U.S. 402 (1960).

[4] The description of the *Pate* holding is by Mr. Justice Harlan who, though dissenting on the facts, agreed with that general principle.

the defendant's competency, the court was obligated to initiate and hold a hearing on the issue.

The similarities between *Pate* and the instant case are substantial. Here, as in *Pate,* a pretrial psychiatric report concluded that the defendant was competent, no pretrial hearing was held on the question, and the defense counsel failed to request such a hearing. Nevertheless, in *Pate* the Court held that a hearing should have been ordered because of the evidence disclosed at the trial.

Similarly here, information was developed at the petitioner's trial which should have, and indeed *did* raise doubts in the mind of the trial judge. The court had heard petitioner's uncontradicted testimony of past and present chronic narcotics use and was disturbed by petitioner's demeanor. During petitioner's cross-examination the trial was halted and the judge specifically inquired into competency, twice noting his "serious doubts" that petitioner was competent to stand trial (App., *infra,* pp. 10a, 12a). In fact, the court was sufficiently concerned that it expressed skepticism about the pretrial psychiatric report, asked government counsel whether any other background or medical reports were available and even solicited defense counsel's views about petitioner's competency (counsel stated that he shared the court's serious doubts).

At that point, having expressed its doubts and having made an inquiry, the court was obligated by *Pate* to direct a formal Section 4244 hearing.[5] Instead, what the judge

[5] The court had many procedural alternatives available to it: (1) declare a mistrial and commit the petitioner for a psychiatric examination and evidentiary hearing, *Featherston* v. *Mitchell,* 418 F.2d 582 (5th Cir. 1969); (2) hold a contemporaneous competency hearing without significantly delaying the trial, *Grennett* v. *United*

did, in effect, was to by-pass and disregard the statutory mechanism by conducting an informal "mini" hearing on the competency question and, apparently, concluding that the petitioner was competent. Such a procedure violates the requirements of *Pate* that demeanor at trial, though relevant to the ultimate decision as to competency, "cannot be relied upon to dispense with a hearing on that very issue." 383 U.S. at 386; see also, *Schoeller* v. *Dunbar*, 423 F.2d 1183, 1189 (9th Cir. 1970) (dissenting opinion). In sum, once the trial judge clearly expressed "serious doubts," he had a constitutional duty to direct a hearing.

The Seventh Circuit dealt with this issue by improperly grafting a harmless error rule onto the *Pate* decision. It did so by concluding that, notwithstanding the trial judge's "serious doubts," there could not be any bona fide doubts about competency because petitioner's only theory was premised on amnesia, a supposedly insufficient basis for claiming incompetency.[6] But that is precisely the kind of retrospective evaluation of the ultimate issue of competency which this Court in *Pate* held could not displace a competency hearing. See, *United States ex rel. Phelan* v. *Brierly*, 453 F.2d 73, 99 (3rd Cir. 1971) *(en banc)* (dissenting opinion).

States, 403 F.2d 928, 932, n. 11 (D.C. Cir. 1968); or (3) proceed to a verdict, holding a competency hearing if petitioner were convicted, *United States* v. *Collins*, 432 F.2d 1136, 1137-38 (7th Cir. 1970); see also, Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 469 (1967).

[6] The Court of Appeals' conclusion was premised on cases holding that amnesia premised on various conditions other than narcotics addiction was insufficient. *E.g.*, *United States* v. *Sullivan*, 406 F.2d 180 (2d Cir. 1969). But the relevant effects of chronic narcotics addiction are significantly different. See *Hansford* v. *United States*, 365 F.2d 920, 922-23 (D.C. Cir. 1966).

The ruling below conflicts with the decision in *Pate* v. *Robinson* and confounds the purposes of Section 4244. The obligations of a District Judge, under the decision and the statute, need to be explicated by this Court.

2.

This Court should grant certiorari to resolve the conflict among the Circuits as to the proper standard to be employed to determine whether an indigent federal defendant has been denied the effective assistance of counsel.

At the end of last Term, this Court completed the enterprise of affording the right to counsel to all persons facing criminal charges. *Argersinger* v. *Hamlin*, —— U.S. ——, 40 U.S. Law Week 4679 (June 12, 1972). Now a person cannot spend one day in jail unless he has had the assistance of counsel during the legal proceeding which caused the confinement. Petitioner suggests that the other major item of unfinished Sixth Amendment business is to insure that the right to counsel will be meaningful as well as systematic. The purposes of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and *Argersinger* v. *Hamlin* will be unfulfilled if the quality of representation by counsel need only be at a level barely transcending a travesty of justice.

This Court has never squarely addresed the issue of the quality of representation demanded by the Sixth Amendment.[7] Some direction was suggested in *McMann* v. *Rich-*

[7] Of course *Powell* v. *Alabama*, 287 U.S. 48 (1932) clearly established that there is a right to effective representation, but the issue arose in the context of a grievously late assignment of counsel which precluded the rendering of effective aid. See also, *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

ardson, 397 U.S. 759 (1970). There the issue was the validity of a guilty plea and this Court relied heavily on the advice of counsel to insulate such pleas. But in doing so the Court suggested that closer scrutiny would be given to assure the soundness of such advice:

> . . . Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends, as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong but on whether that advice was within the range of competence of attorneys in criminal cases. . . . Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts. 397 U.S. at 770-71.

Unfortunately, most of the Circuit Courts have not heeded the admonition. Like the court below, they have judged claimed inadequacy of counsel by an archaic, stringent standard: was the representation so bad that it rendered the criminal proceeding a "travesty of justice" (App., *infra,* p. 4a).[8] Such a standard is an easy device for

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[8] The standard has been variously expressed:

Attorneys services so transparently inadequate as to have made a farce of the trial, *Miller* v. *Cox,* 457 F.2d 700, 701 (4th Cir. 1972);

(footnote continued on next page)

summarily disposing of such claims, but it fails to safeguard the constitutional guarantee.

There has been one notable exception. In a thoughtful *en banc* opinion the Third Circuit explicitly abandoned the traditional, narrow test of adequacy in favor of a requirement of normal competency:

> Whether an indigent is represented by an individual or by an institution, he is entitled to legal services of the same level of competency as that generally afforded at the bar to fee-paying clients. In both cases, therefore, the standard of adequacy of legal services as in the other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.
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> . . . We believe the increased recognition of the constitutional right to the assistance of counsel requires that the standard which prevails in federal cases under the Sixth Amendment should be applied equally to state convictions, to which the same guarantee is made applicable by the Fourteenth Amendment under Gideon v. Wainwright. The standard of normal competency applies equally in each case. This standard also makes it clear that the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission,

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Shocking to the conscience of the court, *Moore* v. *Beto*, 458 F.2d 386 (5th Cir. 1972);

A farce and a mockery of justice shocking to the conscience of the court, *Allen* v. *Perini*, 458 F.2d 233, 236 (6th Cir. 1972);

The trial was a farce or a mockery of justice, *United States* v. *Garrett*, 457 F.2d 1311, 1312 (9th Cir. 1972);

Representation was a sham or pretense, *Tolhurst* v. *United States*, 453 F.2d 432, 434 (10th Cir. 1971).

> but whether counsel's performance was at the level of normal competency. That the client was prejudiced by a failure in performance is of course evidentiary of the issue. *Moore* v. *United States,* 432 F.2d 730, 736, 737 (3rd Cir. 1970) (footnote omitted).

In reaching this constitutional holding, the Third Circuit was sensitive to the practical problems inherent in such a standard, but felt that they could be met.[9]

As the record makes clear, had a *Moore*-type standard been applied, the petitioner's conviction would have been reversed. In addition to court-appointed trial counsel's failure to cross-examine key law enforcement witnesses as to whether petitioner had received custodial interrogation warnings, and counsel's concession of petitioner's guilt to the jury,[10] counsel failed to request a competency hearing even though he felt that petitioner was incompetent (App., *infra,* p. 13a).[11]

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[9] It is interesting to note that the application of the *Moore* standard, which applies to both federal and state proceedings, has not resulted in a rash of invalidated convictions. See, *e.g., United States* v. *Junne,* 458 F.2d 1156 (3rd Cir. 1972); *United States ex rel. Green* v. *Rundle,* 452 F.2d 232 (3rd Cir. 1971); *United States* v. *Chaney,* 446 F.2d 571 (3rd Cir. 1971); *United States ex rel. Koresko* v. *Rundle,* 331 F. Supp. 1292 (E.D. Pa. 1971); *United States ex rel. Hayes* v. *Johnston,* 330 F. Supp. 1115 (E.D. Pa. 1971); *United States ex rel. Wilson* v. *United States,* 330 F. Supp. 822 (E.D. Pa. 1971).

[10] "Now where that automobile went, how it got into the hands of Mr. Stevens, probably it was in his hands at that moment, *he probably was the thief for all we know,* but whatever happened is immaterial, it's not for us to consider." (Tr. 118) (emphasis added).

[11] In *Andrews* v. *United States,* 403 F.2d 341 (9th Cir. 1968) the Ninth Circuit relied on the failure to request such a hearing in holding that a defendant had not received adequate representation. See also, *Owsley* v. *Peyton,* 368 F.2d 1002 (4th Cir. 1966).

But the most glaring and systematic of counsel's failings involved his confusion of the elements of and procedures for invoking claims of incompetency to stand trial, insanity as a defense, and diminished intent. For example, at the conference immediately prior to trial the attorney claimed he desired a bifurcated trial on the theory that the petitioner's capacity to form the requisite intent was diminished by chronic use of drugs. But such a procedure is applicable only when the defense is insanity. *United States* v. *Carlson,* 423 F.2d 431, 435 (9th Cir. 1970); *Harried* v. *United States,* 389 F.2d 281, 284 (D.C. Cir. 1967). Moreover, a diminished intent theory is almost exclusively limited to capital cases, where it functions to reduce the degree of homicide, see *Stewart* v. *United States,* 394 F.2d 778 (D.C. Cir. 1968), and is rarely invoked in a Dyer Act prosecution.

Most importantly, under the case law, the narcotics-induced amnesia claim does not support a defense of diminished intent; it is, however, significantly relevant to the question of competency to stand trial. See, *e.g., Dhaemer* v. *Minnesota,* 456 F.2d 1291 (8th Cir. 1972). It was that issue with which the judge became seriously concerned during petitioner's testimony. Yet defense counsel, presumably because of his confusion, failed to request a hearing on the issue even though he conceded it was the "basic" issue in the case. Indeed the government agreed that defense counsel used the term "incompetence" interchangeably with the concept of diminished intent. Such a fatal lack of understanding of the essential nature of the case is inconsistent with the requirements of the Sixth Amendment. See *People* v. *McDowell,* 447 P.2d 97 (Calif. Sup. Ct. 1968) (unanimous opinion).

The facts of this case reflect the pressing need for a resolution of the dispute as to the quality of legal representation demanded by the Sixth Amendment. Almost a decade ago, Chief Judge J. Edward Lumbard of the Second Circuit noted that:

> There are very few communities in this country where a majority of indigent defendants in criminal cases have adequate counsel. . . . The indigent should have assigned to him . . . counsel who is reasonably competent and who has some experience in the criminal courts. Such counsel should be in a position to devote to the indigent's case the time and attention which would be devoted to the case by the average criminal court lawyer who receives a reasonable minimum fee. . . . Such counsel is adequate; anything less than this is inadequate. Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. Am. Jud. Soey. 176, 178 (1964); see generally, Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L. Rev. 1434 (1965).

Unfortunately, Judge Lumbard's description of the situation is still accurate and his prescription for change has yet to be realized. This failure is particularly ironic for federal defendants who are entitled to rely not only on the promise of the Sixth Amendment but also on the commitment embodied in the Criminal Justice Act, 18 U.S.C. Section 3006A.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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* Attorneys for petitioner wish to express their appreciation to David Rapaport, a third year law student at New York University Law School for his assistance in the preparation of this petition.

APPENDIX

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APPEAL

Befo

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1971 January Session, 1972

No. 71-CR-11

No. 71-1458

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

GEORGE STEVENS,

Defendant-Appellant.

PEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JOHN W. REYNOLDS,
Judge.

March 27, 1972

fore:

SWYGERT, *Chief Judge,*
KILEY and STEVENS, *Circuit Judges.*

SWYGERT, *Chief Judge*:

Defendant George Stevens appeals from a judgment of conviction following a jury verdict of guilty of a charge that he drove a stolen automobile from Chicago to Milwaukee knowing it was stolen, in violation of 18 U.S.C. § 2312.

The defendant was arrested in Milwaukee on July 14, 1970 for carrying a concealed weapon. At that time he was in possession of the car which is the subject matter of the instant prosecution. He told the arresting police that the car was his and the reason he had no title to it was because he was still making purchase payments. After being released from custody the defendant drove the automobile to Texas where he was ultimately arrested on the Dyer Act charge. At the trial it was stipulated that the car was in fact stolen in Chicago on June 23, 1970.

The defendant claims that he was deprived of the effective assistance of counsel because of the ineptness of his court-appointed lawyer. He also seeks reversal of his conviction on the grounds that the trial judge erred in not conducting, sua sponte, a competency hearing pursuant to 18 U.S.C. § 4244 and not instructing the jury with regard to the defense of insanity. We reject the defendant's contentions and affirm his conviction.

Underlying defendant's challenges to his conviction is the fact that he has been a chronic user of an indiscriminate variety of drugs for more than twenty years. The defendant testified that the use of such drugs deprived him of the faculty of memory for intermittent, but substantial portions of his recent life, including the period during which the crime of which he was convicted occurred.

With regard to the question of the adequacy of trial counsel, the defendant asserts that the presentation of an "incongruous defense theory" which "confused" the defenses of incompetency, insanity, and lack of (or inability to form) specific intent is compelling evidence of his counsel's ineptitude. As to the question of his competency to stand trial, defendant urges that evidence of his sporadic amnesia, attributable to heavy drug use, is sufficient standing alone to raise a question of competency to stand trial, or, if not, is sufficient to raise that question on this record where the trial judge expressed some dissatisfaction with the report of the psychiatrist appointed by the court to report on the defendant's competency and also indicated some doubt about the defendant's competency during the trial. Finally, the only evidence in the record related to the defendant's mental state relates to his drug use and its consequences, and we assume that it is that evidence which prompts defendant's appellate counsel to assert as error the failure of the trial court to instruct the jury on the defense of insanity.

The evidence before the trial court regarding the defendant's mental condition was sparse. Upon motion of the defendant's attorney, the trial court ordered a psychiatric examination of the defendant to determine his competency to stand trial. The psychiatrist reported to the court that, at the time of the examination (a month and a half before trial), the defendant understood the nature and quality of the act with which he was charged and the nature of his defense. The psychiatrist related the claim of defendant (reiterated when defendant testified at trial) that he was totally amnesic with regard to the time period critical in this prosecution. The psychiatrist stated, however, that in his view such total amnesia was not likely, though it was

possible, as a result of drug or alcohol intoxication. The defendant testified in his own behalf that he had been a heavy user of drugs for much of his life and that he could remember nothing with regard to the time when the crime was committed. Finally, a licensed pharmacist testified for the defense that one who uses certain drugs, including heroin and cocaine as used by the defendant according to his own testimony, would be able to function in an essentially normal fashion while under the influence of the drugs but might later experience the inability to remember anything that occurred during the period of intoxication.

I

We need not tarry long over the defendant's assertion that he was deprived of the effective assistance of counsel. As we said in *United States* v. *Bella,* 353 F.2d 718, 719 (7th Cir. 1965):

> Unless a strong showing is made that conduct of counsel virtually deprived defendant of a trial, matters of trial conduct and tactics adopted pursuant to defense counsel's professional opinion on the merits of the case should not be subjected to a critique by a court of appeals.

We have also held that the sixth amendment's guarantee of the effective assistance of counsel is satisfied "when the essential integrity of the proceedings as a trial is preserved . . . and the trial has not made a travesty of justice." *United States* v. *Dilella,* 354 F.2d 584, 587 (7th Cir. 1965). Defendant was not denied his right to effective assistance of counsel.

II

Defendant further urges that, notwithstanding a psychiatric report which did not find him incompetent to stand trial, there was sufficient evidence tending to call into question his competency adduced at trial and sufficient uncertainty apparent from the trial judge's comments in that regard to establish the existence of a bona fide doubt as to whether the defendant was competent to stand trial so as to require the trial judge to order, sua sponte, a competency hearing pursuant to 18 U.S.C. § 4244. Section 4244 provides in pertinent part that, when a reasonable doubt exists as to the competency of a defendant to stand trial and that doubt is called to the attention of the court, "the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court." It further provides that if the report of the psychiatrist indicates incompetency the court shall hold a hearing in that regard. Although there is no express requirement that the court order further examination or a hearing subsequent to receipt of a psychiatric report indicating competency to stand trial, it is clear that such would be required should a bona fide doubt subsequently arise during the trial. *Pate* v. *Robinson,* 383 U.S. 375, 385 (1965). The question put to us by this argument of defendant, therefore, is whether the record reveals a basis for a bona fide doubt which arose subsequent to the psychiatric report as to whether the defendant was competent to stand trial.

We believe that the only theory by which the defendant could be found on this record to have been incompetent to stand trial would be that incompetence requires no more than the present inability to recall the events of one's life during the period of the commission of a crime with which

one is charged. Moreover, we do not believe that due process requires that every defendant who claims loss of memory go free without trial. As has been cogently observed:

> In his plight the amnesiac differs very little from an accused who was home alone, asleep in bed, at the time of the crime or from a defendant whose only witnesses die or disappear before trial. Furthermore, courts, of necessity, must decide guilt or innocence on the basis of available facts even where those facts are known to be incomplete, and the amnesiac's loss of memory differs only in degree from that experienced by every defendant, witness, attorney, judge, and venireman. How much worse off is a generally amnesiac defendant on trial for murder, for example, than one who remembers all but the dispositive fact: who struck the first blow?
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> If a defendant is permanently amnesiac, furthermore, there will be no time in the future when the court can secure the benefit of his version of the facts. The choice facing the court would therefore be that of proceeding to adjudicate the defendant's guilt or innocence on the basis of incomplete data or abandoning the adjudicatory process altogether. Note, *Amnesia: A Case Study in the Limits of Particular Justice,* 71 Yale L.J. 109, 128-29 (1961).

The Second Circuit has concluded that lack of memory is an inadequate ground for holding a defendant incompetent to stand trial. *United States* v. *Knohl,* 379 F.2d 427, 436 (2d Cir.), *cert. denied,* 393 U.S. 973 (1967);

United States v. *Currier,* 405 F.2d 1039, 1042 (2d Cir.), *cert. denied,* 395 U.S. 914 (1969); *United States* v. *Sullivan,* 406 F.2d 180, 185-86 (2d Cir. 1969). Indeed, the facts of the competency claim of the defendant in *Sullivan* and the psychiatrists' reports regarding his competence and those in the case at bar are quite similar. In *Sullivan,* the defendant had been an alcoholic for five years including the period during which the crime with which he was charged (forging and uttering a United States' check) had been committed. He claimed that the amnesia characteristic of alcoholics which made it impossible for him to remember the facts of his experiences, whereabouts, and activities on the day of the crime rendered him incompetent to stand trial. The court there concluded:

> If in fact [the defendant] had developed an amnesia preventing his recollection of the events of the day in question, this would not in itself be a complete defense to the charges. . . . Such a loss of memory may call for additional trial safeguards in particular circumstances, as where delay in trial has caused the loss of other evidence, but we are unwilling to hold that it is in all cases an automatic bar to prosecution for a crime amply established by competent evidence on trial. 406 F.2d at 185-86.

We agree with the Second Circuit that amnesia is not a bar to prosecution of an otherwise competent defendant. Since the only theory on which defendant herein could have been held to have been incompetent to stand trial on the record would not justify a finding of incompetency, we hold that the trial court did not err in failing to order further examinations or a hearing as to defendant's competency to stand trial.

III

Finally, defendant contends that the trial court erred in failing to instruct the jury as to the defense of insanity. We note that no objection was made to the failure to give such an instruction so that we may reverse on this ground only if the omission was plain error. FED. R. CRIM. P. 52(b). An examination of the record reveals that, assuming all of defendant's evidence to be true, the only arguable basis for an insanity instruction contained therein is the evidence of defendant's narcotics addiction and the sporadic amnesia he claimed it produced. We do not believe that the existence of either or both of those conditions could properly be said to require an insanity instruction.

The judgment of the district court is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 31, 1972

Before:

HON. LUTHER M. SWYGERT,

Chief Judge.

HON. ROGER J. KILEY,

HON. JOHN PAUL STEVENS,

Circuit Judges.

No. 71-1458

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

GEORGE STEVENS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above entitled cause, no judge in regular active service having requested a vote thereon, nor any judge voted to grant the suggestion, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

Excerpts From Trial Testimony

Stevens—Cross

[62]

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The Court: I don't care what you are talking about. Were you down in Springfield? That is I think it's just a matter—was he at Springfield, Missouri?

Mr. Underwood [for the Government]: He was at Springfield.

The Court: I mean Illinois.

Mr. Underwood: I don't know what for. That was back in 1968, Your Honor.

The Court: I don't care when it was. But it seems to me the question is, obviously I have serious doubts whether or not the man is competent to stand trial.

Mr. Underwood: Your Honor, the Court appointed a psychiatrist—

The Court: He said he was?

Mr. Underwood: Yes, Your Honor.

The Court: I read the report. And that doesn't mean he's right.

Mr. Brady [for the Defendant]: I wasn't impressed with it, Your Honor.

Mr. Underwood: I don't think we are able to make that determination.

The Court: Please.

Mr. Underwood: I am sorry, Your Honor.

[63]

The Court: I am not arguing with you, I am trying to work out a problem. If the man has been in

a governmental hospital, it seems to me the Government should have access to his records down there. Now, the reason we sent him to a local psychiatrist was, I guess, to save the Government a little money so he wouldn't have to go down to Springfield, but don't we have access—don't you, the Government, have access to the records of that hospital?

Mr. Underwood: I am certain that in the event the Defendant wished to sign a waiver, we could get those records. However, I don't see the importance or the relevancy or necessity to get such records, Your Honor. He was in Springfield in 1968. He's testified here that he didn't go there for mental observation, he went there to have an operation.

The Court: Did you?

The Witness: Yes, sir.

The Court: What did they operate on you for?

The Witness: On my toe and I was supposed to have an operation on my ears, my punctured ear drums.

Mr. Brady: Your Honor, I don't know if he knows whether he was there or not for drug observation, but his number would disclose it because I think there is a prefix to his number indicating whether

[64]

he's there for observation or had been in for observation or whether he was there for therapeutic treatment for drugs.

The Court: The man has been in the Waukesha County Jail since November, hasn't he?

Mr. Brady: Yes, Your Honor.

Mr. Underwood: Yes, Your Honor.

The Court: Don't you have—you must have the background on the man and the FBI report and everything.

Mr. Underwood: Yes, we have, Your Honor. The FBI report indicates that this individual has been arrested so many times that I can't even count starting in 1941, he's been convicted numerous, numerous times, and never once has been convicted or arrested for a drug charge. And the Court can observe and look at the record that I have in front of me.

The Court: That may well be so. You act as though I am accusing you of something, I am not.

Mr. Underwood: No, Your Honor, not at all.

The Court: All I want to know is if the man is—I have serious doubts that he's mentally competent to stand trial. Now, if the guy is incompetent, then I think we should know that. The psychiatrist, he was sent to a psychiatrist here and the report is rather vague, but he doesn't say—you read the report?

Mr. Underwood: Yes, Your Honor.

[65]

The Court: And in view of the whole—I have some doubts about his competency and all I am asking is given the background and the resources the Government has, have you had anyone check with Springfield?

Mr. Underwood: No, we haven't, Your Honor.

The Court: He's been in these penitentiaries, they must have a work-up on him.

Mr. Underwood: Your Honor, I am certain that they must, yes.

The Court: Do you think he's competent?

Mr. Underwood: Your Honor, I am not a judge of—

The Court: That is an unfair question. I will withdraw the question.

Mr. Brady: I have an opinion in that respect, Your Honor. I made it clear to the Court.

The Court: You think he's incompetent?

Mr. Brady: That is right, Your Honor. And I have an expert witness coming who is an authority in pharmacology who would testify that the drugs could have just such an effect upon him.

The Court: For whatever reason.

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Statutory Material

18 U.S.C. § 4244

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the con-

sent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-176

GEORGE STEVENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of having transported a motor vehicle interstate knowing it to have been stolen, in violation of 18 U.S.C. 2312. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-8a).

1. Relying on *Pate* v. *Robinson,* 383 U.S. 375, petitioner contends that the district court, on its own motion, should have ordered a competency hearing during trial, because petitioner's testimony concerning narcotics use and loss of memory about the crime raised

a bona fide doubt as to his competency.[1] The court of appeals, in its thorough opinion on which we rely (Pet. App. 5a-7a), properly rejected this contention. Even assuming that petitioner had complete amnesia with respect to the events of the offense, that would not have supported a finding of incompetence to stand trial under proper legal standards. *E.g., United States* v. *Sullivan,* 406 F. 2d 180, 185-186 (C.A. 2); *United States* v. *Knohl,* 379 F. 2d 427, 436 (C.A. 2), certiorari denied, 389 U.S. 973. Hence, there was no error in failing *sua sponte* to order a competency hearing.

2. Petitioner also asserts that his counsel was ineffective, and he suggests that the decision below conflicts with the approach taken by the Third Circuit in *Moore* v. *United States,* 432 F. 2d 730, in formulating the standard for assessing ineffectiveness.[2] *Moore* does state the applicable standard in terms different from those of the court below. This case, however, does not properly present a conflict, because, regardless of whether the traditional formulation and that of the

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[1] On motion of petitioner's counsel under 18 U.S.C. 4244, a pretrial competency examination was ordered. The examining psychiatrist reported that petitioner understood the charges against him and the nature of his defense. He also related petitioner's claim of total amnesia concerning the time of the offense and stated that in his view total amnesia was unlikely (Pet. App. 3a).

[2] The issue in *Moore* was whether an untimely appointment of counsel creates a presumption of prejudice that shifts to the government the burden of showing lack of prejudice (432 F. 2d at 732). The court concluded that no such presumption was necessary and that the lateness of appointment is one consideration pertinent to the adequacy of the representation. In reaching this conclusion, the court articulated the standard for adequate representation as "the exercise of the customary skill and knowledge which normally prevails at the time and place" (*id.* at 736).

Third Circuit are substantively different, petitioner received adequate representation.

Counsel's theory of the defense, explained to the court before trial and to the jury in closing argument, was that as a result of petitioner's drug-induced amnesia he was incapable of forming the necessary intent to commit the offense because he did not know at the time he drove the vehicle across the state line on July 13 that it had been stolen on June 23 (Tr. 3-4, 116-125).[3] It appears that petitioner was consulted with respect to this theory and approved it.[4] Petitioner does not assert that counsel failed to explore other possible theories of defense.

Viewed against this background, counsel's asserted failings were not failings at all. His "failure to cross-examine key law enforcement witnesses as to whether petitioner had received custodial interrogation warnings" (Pet. 13) was consistent with the defense theory. Counsel sought to establish through the officers that petitioner was high on drugs on the day of his arrest, and statements made to them by petitioner were used by counsel to advance his argument that petitioner could not have had the necessary intent to commit the offense (Tr. 26-30, 35-36, 119-123). Moreover, Detective Wojciechowski testified that petitioner was advised of his

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[3] "Tr." refers to the transcript of proceedings in this case, a copy of which we are lodging with the Clerk.

[4] The transcript reflects the following exchange (Tr. 3):

THE COURT: Are you happy with having Mr. Brady as your lawyer?

THE DEFENDANT: Well, from the way he explained it to me, I put my faith to him now.

rights before being interviewed (Tr. 32); petitioner even now does not intimate that the officers failed to give him the proper warnings.

Counsel's "concession of petitioner's guilt to the jury" (Pet. 13) was actually no more than a rhetorical suggestion that, even assuming petitioner himself stole the vehicle on June 23, he was not guilty of the offense of interstate transportation on July 13 because he did not then remember that the vehicle had been stolen (Tr. 118-119).

Counsel is charged also with confusing "the elements of and procedures for invoking claims of incompetency to stand trial, insanity as a defense, and diminished intent" (Pet. 14). It is clear, however, that counsel's expressed theory that petitioner did not know the car was stolen was developed consistently and diligently throughout the trial and included even the presentation of expert testimony (Tr. 78-98). Counsel properly moved prior to trial that petitioner be given a psychiatric examination as to competency. He did not at any time raise the defense of insanity (Tr. 4). Nor did he press a tentative suggestion that the issue of petitioner's capacity to form the requisite intent be submitted to the jury separately (Tr. 3-5). There is, in sum, no support for petitioner's assertion that counsel confused the various defenses.

Petitioner argues that counsel should have moved for a competency hearing because he considered petitioner incompetent. This argument turns, of course, on whether there was any foundation for a finding of incompetence to stand trial. Counsel's view was based on petitioner's alleged loss of memory; we have already

shown that amnesia does not render a person legally incompetent.

Petitioner's counsel made a responsible judgment on what the best strategy seemed to be in defending a case in which the evidence against his client was overwhelming, and he developed the defense case with professional care along those lines. That he could not prevail, and that new appellate counsel have a different view of the best strategy, hardly suggests either a "travesty of justice" or a lack of "customary skill and knowledge."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

☆ U.S. Government Printing Office: 1972—476-669/168